JUSTICE ACCORDING TO LAW.[a]

I. Justice Without Law.[1]

Two antagonistic ideas, the technical and the discretionary, may be seen at work throughout the administration of justice. These might well be called the legal and the non-legal element in judicial administration. With entire accuracy they may be called the legal and the pre-legal element, since the latter represents the type of administration of justice which obtains prior to the administration of justice according to law, and it still obtains where there is no law governing a cause[2] and where rules of law are impossible or inexpedient. For we must bear in mind that law is not logically essential to the administration of justice.[3] Justice may be administered according to the will of the individual who administers it for the time being, or it may be administered according to law. Probably it is true that even in the earliest and rudest justice the will of the judge is not exercised entirely as such, wholly free from the constraint of acknowledged rules of action or principles of decision. On the other hand it is equally true that in no legal system, however minute and detailed its body of rules, is justice administered wholly by rule,

[a]The substance of this paper will appear in a forthcoming book to be entitled "Sociological Jurisprudence."

[1]Salmond, First Principles of Jurisprudence, 89-90; Salmond, Jurisprudence, § 7; Markby, Elements of Law, § 201.

[2]See Markby, Elements of Law, § 26; Gray, Nature and Sources of Law, chap. 5; Geny, Méthode d'interprétation, §§ 145-150; Zitelmann, Die Gefahren des BGB. für die Rechtswissenschaft, 19; Danz, Rechtssprechung nach der Volksanschauung und nach dem Gesetz, § 6. The legislative rôle of the judge in making law for the case in hand, which may lead to a rule for the future, is now coming to be recognized everywhere. Obviously a personal element is more or less involved in the first instance. "It is told that the Romans, friends of pious frauds as well as of juridical fictions, knew how by adroit maneuvres to obtain favorable auspices from the sacred chickens. Has it not been said that 'principles' and 'theories' are the sacred chickens of the modern magistrate? Not without some exaggeration. But it is evident that the personality of the expounder may manifest itself more freely in the ample discussion of principles than in the application of determinate legislative provisions on all fours." Cruet, La vie du droit, 60.

[3]"All that the judge absolutely requires is authority to settle all disputes which come before him. * * * A tribunal altogether without law, though scarcely within our experience, is not a contradiction." Markby, Elements of Law, § 201. "Law is not an essential element in the administration of justice. We cannot have the former without the latter, but we may have the latter without the former." Salmond, First Principles of Jurisprudence, 89.

without any recourse to the will of the judge and his personal sense of what should be done to achieve justice in the cause before him. Both elements are to be found in all administration of justice. But sometimes, as in oriental justice, the one element greatly preponderates; at other times, as in Europe and America of the nineteenth century, the other element all but holds the whole field. For the moment it is enough to insist that administration of justice without law is perfectly conceivable; that it has taken place and that it still takes place to some extent in the most developed systems. The most conspicuous example is oriental justice.[4] Administration of justice by the king in person is of this type.[5] Martial law, so-called, is another example.[6] Remnants of this direct application of the will to the solution of controversies are to be found in legislative and executive justice in modern states, and it has a recognized place in judicial justice under the name of discretion along the border line between law and morals. Before the law, then, we have justice without law, and after the law and during

[4]"By the custom of the East, any man or woman having a complaint to make, or an enemy against whom to be avenged, has the right of speaking face to face with the king at the daily public audience. * * * The privilege of open speech is of course exercised at certain personal risk. The king may be pleased and raise the speaker to honour for that very bluntness of speech which three minutes later brings a too imitative petitioner to the edge of the ever-ready blade." Kipling, The Ameer's Homily (In Black and White, Outward Bound ed. 204). In the stories of Harun al Raschid in the Arabian Nights, one wrongdoer who tells a clever story will go free, while the severest penalty is inflicted on the next who adds dullness to no greater crime. This is oriental justice at its worst. For an example showing a better side of what is still personal as distinguished from impersonal justice, see Wigmore, The Legal System of Old Japan, 4 Green Bag, 403.

[5]Henry II was a lawyer as well as an administrator, and the personal justice to be had before him was the best of its class. It is suggestive, therefore, to observe the extent to which politics dictated his decisions and desire to avoid conflict with the pope brought about compromises rather than judgments; also the obvious partisanship of the tribunal, the giving a private audience to one litigant and putting out of court the learned clerk who suggested points on the side of the other party. See Pollock and Maitland, History of English Law (1st ed.) I, 135-137.

[6]"Martial law, which is built upon no settled principles, but is entirely arbitrary in its decisions, is in truth and reality no law." Blackstone, Commentaries, I, 413. "Martial law is neither more nor less than the will of the general who commands the army. In fact, martial law means no law at all." The Duke of Wellington, Hansard's Debates, 3rd series, CXV, 881. "Martial law is neither more nor less than the will of the General who commands the army. * * * In other words, the entire population of the country, within the confines of its power, is subjected to the mere will or caprice of the commander. He holds the lives, liberty and property of all in the palm of his hand. Martial law is regulated by no known or established system or code of laws, as it is over and above all of them. The commander is the legislator, judge and executioner." *In re* Egan (1866) 5 Blatchford, 319, 321.

the evolution of law, we still have it as a non-legal element under the name of discretion,[7] or natural justice,[8] or equity and good conscience,[9] or permissible relaxation of rules with reference to the requirements of individual cases under certain circumstances,[10]

[7]"Discretion means a power or right conferred upon them by law, of acting officially in certain circumstances, according to the dictates of their own judgment and conscience, uncontrolled by the judgment or conscience of others." Judges *v.* People (N. Y. 1837) 18 Wend. 79, 99. "The discretion of a judge is the law of tyrants. It is always unknown. It is different in different men. It is casual and depends upon constitution, temper, and passion. In the best it is oftentimes caprice. In the worst it is every vice, folly, and passion to which human nature is liable." Lord Camden, quoted by Fearne, Contingent Remainders (10th ed.) 534, n. *t.*

The *aequitas* of civilians (*Billigkeit*) is a discretion in the application of legal rules. Suarez, De Legibus, Lib. II, cap. VI, §§ 5-13. "To speak first of equity, * * * it should be known that the words 'equity' or 'the equitable' are used * * * in connection with those things which the rule of law does not define exactly but leaves to the discretion of a good man." Grotius, De Aequitate, Indulgentia et Facilitate, cap. I, § 2. In this sense, Grotius defines equity as "the correction of that wherein the law is deficient because of universality." De Iure Belli et Pacis, II, 26, 1. Blackstone has this in mind also when he says: "Equity thus depending, essentially, upon the particular circumstances of each individual case, there can be no established rules and fixed precepts of equity laid down, without destroying its very essence, and reducing it to a positive law. And, on the other hand, the liberty of considering all cases in an equitable light must not be indulged too far, lest thereby we destroy all law, and leave the decision of every question entirely in the breast of the judge." Commentaries, I, 61-62.

"It appears to me that a Superior Court, having equitable jurisdiction, must also have a discretion, in certain exceptional cases, to withhold from parties applying for it that remedy to which, in ordinary circumstances, they would be entitled." Lord Watson, in Grahame *v.* Swan (1882) L. R. 7 A. C. 547, 557.

[8]*E. g.,* in the Austrian Civil Code, Introduction, §§ 6-8, it is provided that if a rule of law is not at hand, the judge shall decide in accordance with the rules of law for similar cases and according to the principles for analogous rules of law, and if these do not suffice for a solution, he shall decide "according to the principles of natural law." Compare also section 3 of the Italian Civil Code of 1866. In the conferences on the French Civil Code, we are told that in the absence of express rule of law the judges should be governed by "the rules of equity which exist in the maxims of natural law, universal justice and reason." Observations of le Tribun Faure upon art. 4. It should be remembered that these codes thought of the judges as simply deciding the particular case, not as laying down any rule for the future. See French Civil Code, art. 5.

[9]"It is undeniable that courts of equity do not recognize and protect the equitable rights of litigant parties, unless such rights are, in pursuance of the settled juridical notions of morality, based upon conscience and good faith." I Pomeroy, Equity Jurisprudence, § 385. In such cases as refusal to enforce specifically a hard bargain, the margin of discretion is still considerable, despite the nineteenth-century tendency to reduce the discretion of the chancellor to a minimum.

[10]See *supra,* note 7. For modern discussions of this *aequitas* (*Billigkeit*), see Toullier, Droit civil Français, I, § 149; Geny, Méthode d'interprétation, § 163; Albrecht, Die Stellung der römischen Aequitas in die Theorie des Civilrechts; Bekker, Ueber die römische und die moderne Aequitas, Jahrbuch der internationale Vereiningung für vergleichende Rechtswissenschaft und Volkswirthschaftslehre, I, 337; Schmölder, Die

or equitable application of law, of "free search for the right."[11]

Legal history shows a constant movement back and forth between wide judicial discretion on the one hand, and strict confinement of the magistrate by detailed rules upon the other hand. From time to time more or less reversion to justice without law becomes necessary in order to bring the administration of justice into touch with new moral ideas or changed social or political conditions.[12] Gradually the ideas introduced in these periods of reversion, which are also periods of growth, result in a new body of fixed rules. In time the modes of exercising discretion become fixed, the course of judicial action becomes uniform, and presently an extreme of detailed rule, mechanically applied, has succeeded to an extreme of judicial freedom.[13] But because the course of legal evolution has been away from wide discretion and toward a scientific body of rules, it is not to be inferred that the discretionary element is destined to ultimate extinction. Some parts of the administration of justice obstinately resist the attempt to reduce them completely to the domain of law.[14] We think of some of these,

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Billigkeit als Grundlage des bürgerlichen Rechts; Windscheid, Lehrbuch des Pandektenrechts, I, § 28. For theoretical discussions, see Ahrens, Cours de droit natural (8th ed.) I, 177; Lasson, Rechtsphilosophie, 238-239; Gareis, Science of Law (Kocourek's transl.) § 6; Pulszky, Theory of Law and Civil Society, § 174; Stammler, Theorie der Rechtswissenschaft, 134-136; Bril, Billigkeit und Recht, Archiv für Rechts und Wirthschaftsphilosophie, III, 526. Commentators on the German Civil Code recognize a type of "elastic legal rules" in which this margin of discretion is permissible. Crome, System des deutschen bürgerlichen Rechts, I, § 13.

[11]See Pound, The Enforcement of Law, 20 Green Bag, 401; Pound, The German Movement for Reform in Legal Administration and Procedure (with full bibliography), Bull. Comp. Law Bureau Am. Bar Ass'n, I (1908) 31; Ehrlich, Freie Rechtsfindung und freie Rechtswissenschaft; Gnaeus Flavius (Kantorowicz), Der Kampf um die Rechtswissenschaft; Fuchs, Recht und Wahrheit in unserer heutigen Justiz; Oertmann, Gesetzeszwang und Richterfreiheit; Rumpf, Gesetz und Richter; Brütt, Die Kunst der Rechtsanwendung; Gmelin, Quousque? Beiträge zur soziologischen Rechtsfindung; Kantorowicz, Rechtswissenschaft und Soziologie, 11 ff.; Geny, Méthode d'interprétation; Van der Eycken, Méthode de l'interprétation juridique.

[12]See Pound, Spurious Interpretation, 7 COLUMBIA LAW REVIEW, 379; Clark, Practical Jurisprudence, 340-379; Pollock, The Expansion of the Common Law, 107-138.

[13]See my paper, The Decadence of Equity, 5 COLUMBIA LAW REVIEW, 20.

[14]The law as to fraud is an instructive example. After courts had worked out an elaborate scheme of "badges of fraud" whereby transactions were judged by a detailed system of hard and fast rules, it became necessary by statute to make fraud "a question of fact," that is, to make it a question to be determined by the good sense of the tribunal applied to the facts of each case. Ariz. Rev. St. § 2707; Cal. Civ. Code, § 1574; Col. Rev. St. § 2674; Dist. Col. Civ. Code, § 1120; Idaho Rev.

in our law, as presenting cases peculiarly for the jury and conceal the breakdown of our elaborate system of legal rules in these cases by making it appear that no more than questions of fact have been involved. Other parts of the administration of justice, on the other hand, not only prove susceptible of complete reduction to legal rules, but resist attempts to deal with them in any other way.[15] Salmond's remark that "the proportion between the sphere of law and that of judicial discretion is not fixed but variable,"[16] is true as a statement of legal history, and is no doubt true abstractly in the sense that the conditions which make for preponderance of the one element or the other vary with time, place and people. Yet it is also true that experience is pointing, if not to a true proportion between them, at least to a partitioning of the field of judicial activity between them, and that the problem is gradually settling down to one of the respective fields of two necessary elements in the judicial administration of justice.

In spite of its obvious incompatibility with the social interest in general security and in spite of experience of its ill workings when applied to the securing of social interests through the criminal law, justice without law is much hankered after by the layman.[17] It

Codes, § 3171; Ind. Burns' Ann. St. § 7483; Mich. Comp. L. § 9536; Minn. Rev. L. § 3500; Mont. Rev. Codes, § 4980; Neb. Comp. St. Ch. 32, § 20; Nev. Comp. L. § 4792; N. Y. Pers. Prop. Law, § 26; N. D. Rev. St. § 6640; Or. Ann. Codes & St. § 5511; S. D. Civ. Code, § 2371; Wash. Rem. & Bal. Code, §§ 2292, 2303; Wis. St. § 2323. As to "badges of fraud," see Bump, Fraudulent Conveyances, §§ 41-68; Waite, Fraudulent Conveyances and Creditors' Bills, §§ 224-244.

[15]The most obvious case is the law of property in land, particularly the rules as to the construction and effect of instruments creating interests in land. Even the ordinary process of judicial law-making works badly here. See Gray, General and Particular Intent in Connection with the Rule against Perpetuities, 9 Harv. Law Rev. 242, 246; Rogers *v.* Goodwin (1870) 2 Mass. 475; Goodell *v.* Jackson (N. Y. 1823) 20 Johns. 693; Harrow *v.* Myers (1868) 29 Ind. 469, 470; Rockhill *v.* Nelson (1865) 24 Ind. 422, 424; Smith *v.* McDonald (1871) 42 Cal. 484.

[16]First Principles of Jurisprudence, 89.

[17]See, for example, Roger North's comparison of Turkish and English Law, Life of Sir Dudley North, 43; the proposition of Benjamin Austin for lay referees to take the place of courts and that parties should appear in person or by any friend whether attorney or not before such referees, Honestas, Observations on the Pernicious Practice of the Law, 25 ff. (written 1786, published 1819); Lafcadio Hearn's eulogy of the administration of the old Japanese Law, in which "judgment was decided by moral common sense rather than by legal enactment or precedent," Japan, An Attempt at Interpretation, 384-385; the conventional commendations of the administration of justice by lay magistrates in Colonial America, *e. g.*, 40 Am. L. Rev. 436-437 (but see the observations of Parker, C. J., in Pierce *v.* State (1843) 13 N. H. 536, 557; also Warren, History of the American Bar, 136, 137); Professor Jenks' argument for lay judges, Governmental Action for Social Welfare, 214-216. *Cf.* Parsons, Legal Doctrine and Social Progress, 37-38. "If there is such a thing as

is true, this hankering is more pronounced after a long era of over-minute rules such as our law has been passing through. But even the American colonists, who from bitter experience knew the relation of hard and fast legal rules to liberty, were wont to pursue an ideal of a rude natural justice dispensed without rule by a jury or by a plain man.[18] Extravagant powers are conceded to juries in many jurisdictions because the application of rough standards of justice and the appeal to the emotions involved in these powers are strongly approved by the public. The strong-willed common-sense magistrate, who, on occasion, knows how to set the law aside, is always popular. There are other reasons for this than intrinsic advantages of such an administration of justice. One reason is a wide-spread popular belief that any one is competent to administer justice; that it is an easy task in which the opinion of the layman, formed for the one case, is as good as the opinion of the lawyer, based upon experience of many causes and study of the principles of decision therein. Another is, perhaps, that exaltation of incompetency and distrust of special competency in special fields which seems to be an unhappy by-product of democracy.[19] Another is a notion of the popular will as the fountain of justice; a notion of the sovereign people administering justice for each case by exercise of the sovereign will, as the king did in primitive society. In this view, we get an approximation to popular justice in judicial institutions which reflect accurately the popular impulse of the moment.[20] Still another reason may be that the public are able to appreciate a concrete case better than an abstract principle. But with all deductions upon these grounds, there are certain advantages in a free scope for magisterial discretion.

For one thing, that the public believe justice is done is no

right in the world, let us have it *sine fuco.* * * * Why comes it not forth in its own dress? Why doth it not put off *law,* and put on *reason,* the mother of all just laws?" Warre, The Corruption and Deficiency of the Lawes of England (1649).

[18]Warren, History of the American Bar, 3, 105, 140. In Rhode Island there was no charge to the jury till 1833. Eaton, The Development of the Judicial System in Rhode Island, 14 Yale Law Journ. 148, 153.

[19]See Faguet, The Cult of Incompetence.

[20]Poindexter, The Recall of Judges, Editorial Review, November, 1911; Roosevelt, The Right of the People to Rule, Senate Document No. 473 (1912); Gompers, Labor's Reasons for the Enactment of the Wilson Anti-Injunction Bill, Senate Document No. 440 (1912). See the remarks of Judge Thompson upon the doctrine in some states that jurors are judges of the law. Trials, II, §§ 2134-2136.

less important than that it be done with the greatest possible precision.[21] But justice according to magisterial good sense, unhampered by rule, is more apt to accord with the moral sense of the community, when administered by a strong man, than justice according to technical rule. And one function of the administration of justice is to adjust the relations of individuals to each other so as to accord with the general moral sense. Rules in many of these matters are needed to guide the weak judge and to save us from his lack of will and lack of judgment. But these same rules may serve only to hamper the strong judge and to prevent application of the full measure of his good sense and sound judgment to the case in hand. Such a magistrate may know how to take account of some things, which could not be included in a rule, which nevertheless may be more or less controlling in the individual cause. Moreover, if, as some assert, mercy is part of justice,[22] it is obviously no part of law, which, as Aristotle puts it, "is intelligence without passion."[23] In matters of vital human concern, especially in appraising human conduct, this complete separation of the emotional element cannot be achieved.[24] The most that we can do is to confine it to its proper sphere of questions of conduct and of the moral quality of acts and to insist upon divorcing it utterly from questions of the delimitation of the interests of personality and of substance which the law exists to secure. Wherever, therefore, within proper limits this element must be admitted, we must admit justice without law. Finally, some controversies are too small to admit of rules. They must be settled, but settlement by the elaborate machinery of legal rules defeats its own end because the trouble and expense of working the machinery is too great to make it practicable to resort thereto. Hence the plain common-sense man hampered by few rules has long been our ideal for petty causes. One of the chiefest of the genuine grievances of the American people with respect to American law is the breakdown of our system of administering justice

[21] *Cf.* Lord Herschell's remark to Sir George Jessell: "Important as it was that people should get justice, it was even more important that they should be made to feel and see that they were getting it." Atlay, Victorian Chancellors, II, 460. "Discredited justice is almost as bad as veiled injustice." Chalmers, Trial by Jury in Civil Cases, 7 Law Quart. Rev. 15, 20.

[22] Lorimer, Institutes of Law (2nd ed.) 314.

[23] Politics, III, 16.

[24] See Chalmers, Trial by Jury in Civil Cases, 7 Law Quart. Rev. 15.

in such causes through failure to provide the type of magistrate to whom alone this royal power may be wisely entrusted.[25]

So far, then, as the function of law is merely to adjust controversies peaceably, administration of justice without law has its place. But this is no more than a small part of the function of law. Such an administration of justice at best only partly protects the social interest in general security. The social interest in the security of transactions and the social interest in the security of acquisitions are but feebly protected and may even be defeated. The individual interest of personality is defeated if the limits of the rights that secure it are not set off by fixed rule and maintained by a uniform course of judicial action. Under an oriental régime one must take many chances in believing that his ideas of justice will agree with those for the time being of the judge or magistrate when he passes upon the matter; one cannot with safety do anything involving large expenditure of labor or money or extending over a long time. With increasing complexity of affairs, the bad effects of such lack of rule in the administration of justice are more acute.[26] Civilization increases this complexity, and so demands law, that is, rule and order in the administration of justice, so that men may act assuredly with reference to the future. One essential of the administration of justice in a modern state, then, is uniformity. Experience has shown abundantly that this is attainable only by measuring situations and relations, as they become the subjects of controversy, by reason. To a certain extent, the will of society as to the relations of individuals with each other may be ascertained and declared in advance. But, as a rule, this is possible only along general lines. Hence, for the great mass of causes, uniformity and certainty are to be reached in no other way than by requiring the magistrate to bring a trained reason to bear upon them. The idea with which we meet sometimes, that courts should administer the will of the people for the time being in each case, is as un-legal and opposed to justice as the corresponding seventeenth-century notion that in every case they ought to administer the will of the king for the time being.[27]

[25]Continental writers who urge wider discretion for judges are recognizing that strong judges must be part of the reform. See, for example, Grabowsky, Recht und Staat, 25.

[26]For an example of failure of justice without law in modern times see Thayer, Legal Essays, 91 ("A People Without Law"), 135-139.

[27]Thus, Sir C. Hatton said it was "the holy conscience of *the Queen*, for matter of equity that is in some sort committed to the Chancellor." Spence, History of the Equitable Jurisdiction of the Court of Chancery, I, 414; Bacon, on taking his place as Lord Keeper announced in his speech

If left to act freely in individual cases, without rule or standard, no will, either of king or of people, is sufficiently set and constant to insure a uniform administration of justice.[28] Judicial or magisterial caprice is incompatible with the paramount social interest in general security.

A modern community not only requires law, but it requires a great deal of law. In a crowded world, compromises between the activities of each and the activities of his fellows are necessary at many points. Increase in the possibilities of human action as well as increase in the number of those who may act demands increased limitations upon each individual in the interest of free action by other individuals; and yet such limitations in reality increase the possibilities of effective individual action by making division of labor possible. Division of labor cannot exist without restraints on the liberty of each in the interest of the like liberties of all. But these limitations, to achieve their purpose, must be regulated definitely, and, as we have seen, that means for practical purposes that they must be regulated by reason. In other words, they require law. They require that certainty in definition and application involved in the administration of justice according to law. Accordingly, the whole course of development of society has shown a movement away from justice without law and toward the working out of a scientific and complete body of rules for the administration of justice.[29]

And yet there are other interests to be taken account of—not the least of them, the social interest in the individual moral and

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that the King's charge was his lantern to guide the conduct of his office, Works, (Spedding's ed.) XIII, 182, 184; Sir Robert Heath, in Darnel's trial, laid it down *arguendo* that the duty of the judges was to take the law from the King on all matters of royal action and reminded them of the then royal power of recall of judges, saying: "there be *Arcana Dei et Arcana Imperii* and they that * * * make themselves busier with them than their places do require, they will make themselves—I will say no more," 3 How. State Trials, 44; Compare: "The supreme court, so far as it is a purely judicial body,—that is a body for hearing and deciding cases—is simply a means of executing the will of the state." Smith, Spirit of American Government, 345. "Judges should be independent of every power on earth except the sovereignty that creates them. Meet that proposition of democracy." Manahan, Proc. Minn. Bar Ass'n, 1911, 128.

[28]"Kings generally appointed judges to carry out their will which was just defeating the end for which the office ought to exist. Judges are in no sense representatives of the people or the king, or of any will whatever, except so far as they take a place which the people or the king filled before." Woolsey, Political Science, II, 330.

[29]Saleilles, speaking of the reaction from the movement in France which threatened to replace law by sociology, says: "More and more the idea of law, the idea of juridical order and of juridical security is gaining ground." L'individualisation de la peine (2nd ed.) ii.

social life. We have to administer justice to a community of free-willing men, and to deal with relations of conduct and aspects of conduct which require fine shades and particular compromises as well as the broad lines and general compromises which are required by and suffice for those social and individual interests which are involved in the purely economic existence. In an agricultural society, where the economic existence is simple, justice without law is at its best. In a commercial and industrial society, where the economic existence is extremely complex, and delimitation of individual interests is demanded by the social interest in security of transactions and security of acquisitions, justice without law is pushed to the wall by the demand for a maximum of certainty. Yet the need of and the place for discretion in the administration of justice in such a society is no less real, as the failure of the attempt to reduce all things to rule in the nineteenth century has made manifest. The problem is not to discover the fundamental principles or ultimate conceptions from which a complete and perfect body of rules may be deduced, but to define rightly the respective provinces of these two elements in the administration of justice and to give to each its proper development in that province.

II. Justice According to Law.[30]

Administration of justice according to law means administration according to standards, more or less fixed, which individuals may ascertain in advance of controversy and by which all are reasonably assured of receiving like treatment. It means an impersonal, equal, certain administration of justice, so far as these may be secured by principles of decision of general application.

It has commonly been thought that the ideal is a perfect system of rules by which, either expressly or indirectly through rigid deduction or a sort of mathematically exact development of the logical content of what is expressed, all causes may be determined with an absolute certainty of like result in like cases and an absolute assurance that accurate prediction of the result may be made, if the facts are rightly understood.[31] Experience has shown

[30]Pollock, First Book of Jurisprudence, Pt. I, chap. 2; Salmond, First Principles of Jurisprudence, 90-92; Salmond, Jurisprudence, §§ 9-10; Demogue, Les notions fondamentales du droit privée, Pt. I, chaps. 2-3.

[31]Leibniz, Ratio corporis iuris reconcinnandi, Dutens, Leibnitii opera omnia, IV, 3, 235; "one certain law, then, must be established, which, by laying down solid principles, may be applied to all the cases that occur

that this ideal cannot be realized. Even in the most matured legal systems causes arise constantly for which the rule must be made or ascertained after the event. It is only within somewhat wide limits, often, that a jurisprudence of conceptions,—that is a system of logical deduction from fixed legal premises,—may be made to insure certainty of predicting the result upon given facts.[32] We have been wont to say that this is a necessary evil, arising from the infinite variety of human actions and the constant changes to which all things are subject; and in great measure so it is. Even if a jurisprudence of conceptions proved equal to covering all conceivable cases, it would be intolerable, if adhered to with absolute logical consistency, because the premises, made for the ends of one time, would prove inadequate to the ends of another time. Hence a chief objection to such a plan for attaining absolute certainty lies in its application to the conditions of periods of transition. By and large, the whole course of legal development has been toward greater certainty, greater precision in the delimitation of interests and definition of legal standards of decision, and a more complete and detailed working out of those standards. When, in certain periods of legal development, some reversion to justice without law has been necessary, as a means of liberalizing an over-rigid body of rules, an evolution of new rules has always followed hard upon its heels. Thus in Anglo-American law the origin of equity may be referred to the same power of dispensing with the law in particular cases for particular reasons that afterward helped to bring about the downfall of the Stuarts. Equity began as a reaction toward justice without law.[33] It became a system of rules wherein the element of judicial discretion was given greater play and the circumstances of particular cases were more attended to than the practice of the common law would permit. But as soon as it began to be a system, the scope for discretion began to narrow steadily. Hence the development from the roguish equity of which Selden spoke, which he said varied with the chan-

* * * that is to say, a body of law reduced to a system, containing the whole of jurisprudence, ranged in the most natural and convenient order, with the general principles on every subject and the consequences flowing from them." Preface to the project of Frederick the Great's Code, §§ 1-2; Hegel, Grundlinien der Philosophie des Rechts, § 216; Austin, Jurisprudence, Lect. 39. See also Geny, Méthode d'interprétation, § 10; Cruet, La vie du droit, 61.

[32]There is a suggestive discussion of this point in Phelps, Juridical Equity, §§ 183-184.

[33]Salmond, First Principles of Jurisprudence, 93.

cellor's foot,[34] to Lord Eldon's equity, which was made up of doctrines "as well settled and uniform *almost* as those of the common law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case."[35] The next step, namely, to *apply* the principles as fixedly "almost" as those of the common law are applied, was taken by American state courts at the end of the nineteenth century.[36]

It was remarked long ago that law and equity, meaning thereby in part, if not chiefly, justice according to law and justice without law, are in continual progression:

"Law and equity are in continual progression; and the former is constantly gaining ground upon the latter. Every new and extraordinary interposition is, by length of time, converted into an old rule. A great part of what is now strict law was formerly considered as equity, and the equitable decisions of this age will unavoidably be ranked under the strict law of the next."[37]

To the same effect, Amos says:

"The alternative appearances of law and of equity as the mutual checks and corrections of one another are lasting and not transitory phenomena. However severely and peremptorily equity, and all the arbitrary judicial power implied in its exercise at par-

[34]"Equity in law is the same that the spirit is in religion, what everyone pleases to make it, sometimes they go according to conscience, sometimes according to law, sometimes according to the will of the court. Equity is a roguish thing; for the law we have a measure, know what to trust to; equity is according to the conscience of him that is chancellor, and as that is larger or narrower, so is equity. 'Tis all one as if they should make his foot the standard. For if the measure we call a chancellor's foot, what an uncertain measure this would be. One chancellor has a long foot, another a short foot, another an indifferent foot; 'tis the same thing in the chancellor's conscience." Selden, Table Talk, tit. Equity (Selden died 1654). In 1648, Whitelocke, Lord Commissioner under the Commonwealth, said: "The proceedings in Chancery are *secundum arbitrium boni viri*, and this *arbitrium* differeth as much in several men as their countenances differ. That which is right in one man's eyes is wrong in another's." Commons Journals, VI, 373. "And namelie for as moch as conscience is a thinge of great uncertaintie; for some men thinke that if they treade upon two strawes that lye acrosse that they ofende in conscience, and some man thinketh that if he lake money, and another hath too moch, that he may take part of his with conscience; and so divers men, divers conscience." Replication of a Serjaunte at the Lawes of England to Certain Pointes Alledged by a Student of the said Lawes of England (*temp.* Henry VIII), Hargrave, Law Tracts, 323, 325.

[35]Gee *v.* Pritchard (1818) 2 Swanst. 402, 414. Compare Lord Blackburn in Brooks *v.* Blackburn Benefit Society (1884) L. R. 9 A. C. 857, 866: "This is an important decision. It seems to be justice; whether it is technical equity is a question which, I think, is not now before this House."

[36]See many examples and a discussion of the reasons therefor in my paper, The Decadence of Equity, 5 COLUMBIA LAW REVIEW, 20.

[37]Millar, Historical View of the English Government, II, 358.

ticular epochs, may be controlled and discredited, there is reason to think its resurrection must be constantly waited for. So soon as a system of law becomes reduced to completeness of outward form, it has a natural tendency to crystallize into a rigidity unsuited to the free applications which the actual circumstances of human life demand. The invariable reaction against this stage is manifested in a progressive extension, modification, or complete suspension of the strict legal rule into which the once merely equitable principle has been gradually contracted."[38]

In this view, justice without law is limited to a perennially recurring task of liberalization, as from time to time the inevitable effects of system are felt in over-rigid rules. But the very fact that in the pursuit of certainty and equality rules become over-rigid suggests that there is more to be done than merely to rejuvenate the law at recurring intervals. Undoubtedly this must be done, and justice without law has been one of the agencies by which it has been done in the past. In large part, however, justice without law reconquers from time to time a legitimate field from which law cannot wholly exclude it.[39] It is, therefore, a mistaken ideal that conceives of an ultimate reduction of everything to rule. Since Savigny's critique of the eighteenth-century projects for codification, jurists have given up the notion of attaining such an ideal through legislation, and in the nineteenth century they sought to attain it by an ideal development of traditional principles from which a certain rule for every cause might be deduced by purely logical processes. More recently a reaction from the resulting jurisprudence of conceptions has been in progress the world over.[40] In part this reaction calls for a freer exercise of judicial reason

[38]Science of Law (2nd ed.) 57-58. See also the observations of Lord Hardwicke, Letter to Lord Kames on the Principles of Equity, Parkes, History of the Court of Chancery, 501, 505-6. But this prophecy of continual recurrence to justice without law as a means of liberalization is not justified entirely by the past, and is by no means verified by the present. The law merchant was a liberalizing element, and yet it involved no return to justice without law. The socialization of law appears to be going forward at present with, at least, a minimum of justice without law. There may be liberalization by absorption of a non-professional element into the law, and yet that element may be taken over and administered in the form of rules.

[39]Procedure is a typical example. The liberal procedure of the Year Books grew into a hard and fast system of pleading; the judicial common sense of the eighteenth century and of the first part of the nineteenth century grew into a hard and fast law of evidence. We are now going back to discretion in procedure after sore experience of the impossibility of reducing it wholly to fixed rules.

[40]Saleilles speaks of this reaction as a time "when jurists were confronted on the one hand by unprofitable essays in the field of abstract law and on the other hand by dangers threatened by reformers who, in their disregard of the judicial attitude, were prepared to replace law by sociology." L'individualisation de la peine, preface to 2nd ed. (English transl. pp. xxi-xxii).

than in the past. But it calls also for a setting free of more than one part of judicial administration from the fetters of detailed rules.[41] In the preceding section some reasons were given for thinking that it will be futile to seek for some third method of attaining the ideal of a complete and perfect system of rules, and for holding that administration of justice without law is an essential element of all administration of justice. It is now in order to approach this question and the problem of the respective provinces of rule and discretion from another side.

Administration of justice according to law has six advantages:[42] (1) Law makes it possible to predict the course which the administration of justice will take; (2) law secures against errors of individual judgment; (3) law secures against improper motives on the part of those who administer justice; (4) law provides the magistrate with standards in which the ethical ideas of the community are formulated; (5) law gives the magistrate the benefit of all the experience of his predecessors; (6) law prevents sacrifice of ultimate interests, social and individual, to the more obvious and pressing but less weighty, immediate interests.

It is unnecessary to say that the first of these advantages is decisive in the modern world. The social interests in security of acquisitions and security of transactions demand not only a peaceable ordering of society but quite as much certainty and uniformity of magisterial and judicial action. Where law brings about this certainty and uniformity, labor and capital may be spent upon great undertakings of a permanent character with assurance of the course which the state will pursue and will compel others to pursue with respect thereto. Hence in the history of law, as Montesquieu pointed out, periods of commercial and industrial development make for certainty.[43] The industrial and commercial world de-

[41]Upon both phases of this reaction, see my paper, Mechanical Jurisprudence, 8 COLUMBIA LAW REVIEW, 605. Perhaps nowhere is this movement away from rules and reversion to wide judicial powers so marked as in the Juvenile Courts and Courts of Domestic Relations which are coming to be so much in vogue.

[42]Salmond, First Principles of Jurisprudence, 90-92; Salmond, Jurisprudence, § 9; Korkunov, General Theory of Law (Hastings' transl.) 326-327, 395-396.

[43]L'esprit des lois, liv. XX, chap. 18. *Cf.* Carter, Law: Its Origin, Growth, and Function, 335-336. Hence the insistence upon certainty as a paramount requirement in nineteenth-century law. "Uncertainty is the gravest defect to which a law can be exposed and must *at whatever cost* be avoided." Hearn, Theory of Legal Duties and Rights, 43. "Their justice or injustice in the abstract is of less importance to the community than that the rules themselves shall be constant and invariable." Lord Westbury in Ralston *v.* Hamilton (1862) 4 Macq. 397, 405. See also Lord Cottenham in Lozon *v.* Price (1840) 4 My. & Cr. 600, 617; Parke, B., in Mirehouse *v.* Rennell (1833) 1 Cl. & F. 527, 546.

mand rules. No one devotes his life to a specialized bit of labor, becoming a minute cog in an industrial machine, or engages in complex commercial undertakings, or makes large investments trusting to uniform exercise of discretion or to free judicial search for the right.[44]

The second and third advantages are no less decisive in modern society. Political experience has made clear abundantly the truth of Stammler's axiom of justice through law: "One will must not be subject to the arbitrary will of another."[45] The individual interest in personality and the social interest in the individual moral and social existence require precise delimitation of interests of personality and judgment of conduct by standards applied in accordance with principles of reason.[46] If rules and over-rigid standards sometimes hinder the judge and prevent the best solution of which he is capable, they secure us against the well-meant ignorance of the weak judge and are our mainstay against improper motives on the part of those who administer justice. Oriental judges, bound by little or no law, are notoriously corrupt.[47] A judge tied down on every side by rules of law and the necessity of publicly setting forth his reasons upon the basis of such rules, cannot do much for a corrupter, if he would. In consequence, highly formal

[44]"It may be that his decision will be governed by 'the social standard of justice,' but the essential point is that no human being can tell how the social standard of justice will work on that judge's mind before the judgment is rendered." Fox, Law and Logic, 14 Harv. Law Rev. 39, 43.

[45]Lehre von dem richtigen Rechte, 208.

[46]"Of course in the application of legal rules conflicts must occur which must be determined by the reason of the judge. * * * But the worst solution would be to give full play to the well-meant personal opinions of the judge in order to do away with these conflicts." Hegel, Grundlinien der Philosophie des Rechts, § 211 (Dyde's transl. p. 208). An important function of law, in this connection, is to insure an even balance between conflicting class interests. "While the sovereign claims of the common welfare are today admitted in form, the modern multitude, like the aristocracy it has displaced, is apt to assume that its own interest is necessarily identical with the common welfare. It threatens at times to pass under the domination of those who in place of the old notion that the welfare of the majority should be subordinated to the interests of the minority, would substitute the doctrine that the interests of the minority need not be taken into account." Jethro Brown, Underlying Principles of Modern Legislation, 197. This is the justification of American constitutional law.

[47]Compare the administration of justice without law by lay magistrates in Colonial America: "As the executive functionaries were not generally lawyers, * * * they were not much influenced in their decisions by any known principles of established law. So much, indeed, was the law supposed to depend upon the favor or aversion of the court, that presents from suitors to the judges were not uncommon, nor, perhaps, unacceptable." Plumer, Life of William Plumer, chap. 5, p. 149.

and technical systems are often prized as bulwarks of liberty,[48] and necessary liberalizations which involve judicial discretion are looked upon with suspicion by those who would be expected to stand for progress.[49]

Although less important, the fourth and fifth advantages are very real. Even where detailed rules are impossible from the nature of the case, if we are to prevent arbitrary subjection of the will of one to the will of another, something more than a general reference to the social standard of justice or the ethical notions of the community is required. The law may furnish standards where it cannot furnish rules, and these standards may formulate the social standard of justice or the ethical notions of the community so as to guide the magistrate. More than this, the rules and principles of the law contain the experience of the past in administering justice. No judge can hope to have the experience which they involve and make available. In this respect the law has been compared aptly to the rules and formulas of the engineer. The engineer finds the wisdom and experience of his predecessors summed up in these formulas. He has only to apply them. He may never be able to discover all of them independently for himself. He may never have seen some of them exemplified. He may

[48]The Commons petitioned against Chancery ten times between the reigns of Richard II and Henry VI. See Coke, Fourth Institute, 82-84; in 1653 the House of Commons voted "that the High Court of Chancery of England shall be forthwith taken away, and that a bill be brought in for that purpose." Parkes, History of the Court of Chancery, 149; the American colonies obstinately resisted equity. Loyd, Early Courts of Pennsylvania, chap. 4; Woodruff, Chancery in Massachusetts, 5 Law Quart. Rev. 370; Wilson, Courts of Chancery in the American Colonies, Select Essays in Anglo-American Legal History, II, 779, 792-795. The ground of hostility to equity in each of these cases was substantially that stated by the sixteenth-century serjeant at law: "Also me seemeth that this suit by a subpœna is againste the common well of the realme. For the common well of everie realme is to have a good lawe, so that the subjects of the realme maie be justified by the same, and the more plaine and open that the lawe is, and the more knowledge and understanding that the subject hath of the lawe, the better it is for the common well of the realme; and the more uncertaine that the lawe is in any realme, the lesse and the worse it is for the common well of the realme. But if the subjects of any realme shall be compelled to leave the lawe of the realme, and to be ordered by the discretion of one man, what thinge may be more unknowen or more uncertaine?" Hargrave, Law Tracts, 323, 325. Compare: "Yea, it is a considerable *Quaere*, Whether the Court of Chancery were not first erected merely to elude the letter of the Law, which, though defective, yet had some certainty; and, under a pretence of conscience, to devolve all causes upon mere Will" Warre, The Corruption and Deficiencies of the Lawes of England (1649).

[49]Thus, Jefferson advocated a rule against citation of English decisions after the accession of George III, on the ground that it would get "us rid of all Mansfield's innovations." Tyler, Letters and Times of the Tylers, I, 265.

never have worked out a single formula. Yet by means of these formulas he can work swiftly and surely. In the same way the judge can dispatch a large part of the great mass of litigation that comes before him in the modern court with assured confidence by applying formulas which he has no time to work out anew, which, moreover, he need not know how to reach independently.[50]

Finally, administration of justice according to law insures that in the weighing or balancing of conflicting interests, the more valuable ultimate interests, social and individual, will not be sacrificed to immediate interests which are more obvious and pressing but of less real weight. It provides a standard, determined in advance of controversy upon deliberate and dispassionate review of all the interests to be secured and the relative importance of each in the long run, and thus opposes an effective check to the natural human impulse to yield future interest to apparent present advantage. In this way the law secures social interests, such as the interest in security of social institutions and the interest in the use and conservation of natural media which, if controversies were adjusted by the unfettered will of the magistrate in each case, might be made to yield continually to the more immediately urgent interests of individuals.[51]

On the other hand administration of justice according to law has certain inherent disadvantages. (1) Certainty and uniformity are sought through rules or through logical deductions from fixed principles and narrowly defined legal conceptions. But rules must be made for cases in gross and for men in the mass.[52] From the fact that they are rules, they must operate, if not blindly, at least impersonally and mechanically.[53] (2) Moreover the science and system involved in a jurisprudence of conceptions carry with them a tendency to make law an end rather than a means, a tendency

[50]Salmond, Jurisprudence, § 9; Dillon, Laws and Jurisprudence of England and America, 231.

[51]Thomas Aquinas, Summa Theologiae, Prima Secundae, q. 95, art. 2, § 2 (Rickaby's transl.).

[52]See Maine, Early History of Institutions, 393; Jethro Brown, Underlying Principles of Modern Legislation, 181.

[53]Compare, for instance, a rule of property law with a "maxim" of equity. "Unlike maxims, they [i. e. rules] are narrow and definite in their scope, practical and pointed in their application." Phelps, Juridical Equity, § 178. The same author says in another place: "Maxims are useful as standards of weight and measure by which the bearing and effect of circumstances in proof can be tested and estimated. Having performed this office, maxims then stand for the point of view from which a court will finally adjust its position to contemplate and adjudge the case." *Id.* § 185. The latter represent a movement toward certainty in a jurisdiction that at first administered justice without law.

to make what is a practical matter over-academic and over-scientific. Such a tendency was very marked in legal systems at the end of the nineteenth century. (3) Again, law begets more law and a developed system has always produced a tendency to attempt rules where rules are impracticable and to invade the legitimate domain of justice without law.[54] (4) Finally, as law formulates settled ethical ideas which cannot in periods of transition accord with the more advanced conceptions of the present, there is always an element, greater or less, that does not wholly correspond to present needs or to present conceptions of justice.

Connected with the problem of rule and discretion, of justice according to law and justice without law, is the problem by whom justice is to be administered. Is there to be a specialized organ of the state for the performance of the judicial function, or is that function to be performed in whole or in part by organs charged with other functions as well? Is there to be administration of justice by specialists (judicial justice) or by those who wield other governmental powers as well (legislative justice, executive justice) or partly by one and partly by the other, and, in the latter case, where shall we draw the line between them? Answer must be made to these questions in the next paper.

(To be Continued)

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[54] See my paper, Mechanical Jurisprudence, 8 COLUMBIA LAW REVIEW, 605.